

STATE OF NEW MEXICO  
ENVIRONMENTAL IMPROVEMENT BOARD

No. EIB 16-03(R)

IN THE MATTER OF PROPOSED REVISIONS TO:  
New Mexico's State Implementation Plan

Air Quality Bureau,  
Environmental Protection Division of the  
New Mexico Environment Department,

Petitioner.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 9th day of  
September, 2016, the above-entitled matter came on for  
hearing and deliberations before the New Mexico  
Environmental Improvement Board, taken at the State  
Capitol Building, Room 307, Santa Fe, New Mexico, at the  
hour of 9:11 a.m.

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## A P P E A R A N C E S

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1 MR. HOLT: Good morning.

2 I call this meeting to order.

3 I've been designated by the EIB to act as the  
4 Hearing Officer in this matter.

5 This hearing is being held to consider the  
6 proposed changes to the New Mexico State Implementation  
7 Plan. The rulemaking petition was filed by the  
8 Environmental Department and docketed as EIB 16-03(R).

9 Chairman Volkerding adopted a procedural order  
10 providing that the Board's rulemaking procedures set out  
11 in 20.1.1 NMAC will be used in this matter, although no  
12 proposed regulatory change. We have Judge -- Judge  
13 Volkerding -- Chairman Volkerding has decided the  
14 process is similar enough to provide a fair and  
15 impartial proceeding.

16 Pursuant to these procedures, I will conduct  
17 the hearing so as to provide a reasonable opportunity  
18 for all persons to be heard without making this hearing  
19 unreasonably lengthy.

20 The Rules of Civil Procedure and the technical  
21 Rules of Evidence will not apply. I'm allowed to make  
22 whatever orders are necessary to preserve decorum.

23 All testimony will be taken under oath, and  
24 all persons giving testimony will be subject to  
25 cross-examination by any other person in attendance on

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1 the subject matter of their testimony and on matters  
2 affecting their credibility. I will limit  
3 cross-examination as necessary to avoid harassment,  
4 intimidation or repetition.

5 This hearing is being recorded and transcribed  
6 by Cheryl Arreguin of Kathy Townsend Court Reporters,  
7 and you may obtain a copy of the transcript directly  
8 from the court reporter. It will also eventually become  
9 a public record, viewable in the office of the Board  
10 administrator.

11 If you have not signed in, please do so,  
12 regardless of whether you wish to present testimony.

13 If you have a phone or pager with you, please  
14 silence it now.

15 Members of the Board, the petition is -- the  
16 file contains the petition for hearing, the Department's  
17 notice of intent to present technical testimony and  
18 written support for NMED's AQB's approach.

19 No other parties have filed motions.

20 There will, of course, be an opportunity for  
21 comments by members of the public, and if any members of  
22 the public intend to comment, please sign in on the  
23 register so the amount of time needed can be calculated  
24 and we can schedule our time accordingly.

25 Mr. Atencio, Mr. Knight, please make your

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1 appearances and introduce your witnesses.

2 MR. ATENCIO: Thank you, Mr. Chairman, Hearing  
3 Officer Holt.

4 Andrew Knight could not be here today. My  
5 name is Chris Atencio. I'm here representing the New  
6 Mexico Environment Department Air Quality Bureau. With  
7 me are Mr. Robert Spillers with the Bureau and Ms. Rita  
8 Bates.

9 And would you like me to introduce our panel  
10 witnesses now or --

11 MR. HOLT: Yes.

12 Before you do, if I can remind you, we have  
13 somebody participating by phone, and we do not have a  
14 good system set up. Can you speak as loud as you  
15 reasonably can under the circumstances for the entire  
16 proceedings?

17 MR. ATENCIO: Yes. I will -- I will speak  
18 much more loudly.

19 MR. HOLT: Thank you.

20 MR. ATENCIO: And also here today, Ms. Renee  
21 Held, also with the Bureau, and -- just double-check --  
22 if necessary, we also have Mr. Ralph Gruebel from the  
23 compliance and enforcement section of the Bureau, if  
24 there are any questions that you may have that he might  
25 be more able to answer.

1 MR. HOLT: Do you have an opening statement?

2 MR. ATENCIO: Yes. Thank you, Mr. Hearing  
3 Officer.

4 Mr. Chairman, members of the Board, as I said,  
5 my name is Chris Atencio. I am assistant general  
6 counsel with New Mexico Environment Department.

7 This matter comes before you today because of  
8 a SIP call issued by the EPA regarding affirmative  
9 defenses for startups, shutdowns, malfunctions and  
10 emergencies. The effective provisions are located in  
11 20.2.7 of the NMAC. As alluded to earlier in discussing  
12 the procedural order, this proposal is a proposed SIP  
13 revision and not a change to the regulations themselves.

14 You will hear testimony from Mr. Spillers to  
15 that effect, as to the reasons supporting that -- the  
16 proposal today. And because of that, there are -- the  
17 notice requirements are as noted in the procedural order  
18 slightly different than a normal rulemaking.

19 As you are probably well aware, the Clean Air  
20 Act requires a public notice and a hearing opportunity.  
21 In this circumstance, though, because this is a  
22 rulemaking, the Department proposed and the procedural  
23 order noted that the publication in the New Mexico  
24 Register and the normal time frame for a rulemaking  
25 notice did not -- were not applicable in this situation.

1 So notice was handled on a normal open meeting light  
2 schedule.

3 This morning the Department intends to call  
4 Mr. Spillers to provide technical testimony regarding  
5 the Department's proposal to remove the cited sections  
6 of the regulations from the New Mexico SIP while leaving  
7 them in place as state-only regulations. The Department  
8 intends to provide its other witnesses as technical  
9 witnesses available to answer any questions that you or  
10 members of the public may have.

11 With that, I have no -- that concludes my  
12 opening statement.

13 And if there's nothing else, may I call  
14 Mr. Spillers to begin his testimony?

15 MR. HOLT: Absolutely.

16 If you'd have the witnesses sworn in, please.

17 THE REPORTER: I'll swear in all the witnesses  
18 at the same time.

19  
20  
21  
22  
23  
24  
25

1 ROBERT SPILLERS, RITA BATES,  
2 RENEE HELD and RALPH GRUEBEL  
3 having been first duly sworn or affirmed, were  
4 examined and testified as follows:

5 DIRECT EXAMINATION OF ROBERT SPILLERS

6 BY MR. ATENCIO:

7 Q. Please state your name for the record.

8 A. Robert Spillers, S-P-I-L-L-E-R-S.

9 Q. What is your employment position?

10 A. I am an environmental analyst in the Control  
11 Strategies Section of the Air Quality Bureau.

12 Q. Mr. Spillers, how long have you held this  
13 position?

14 A. I've been with Control Strategies Section  
15 since September of 2005, approximately 11 years.

16 Q. And what is your educational background?

17 A. I hold a bachelor of science degree in  
18 environmental science and management from New Mexico  
19 Highlands University.

20 Q. Is what has been marked as NMED Exhibit 4 an  
21 accurate copy of your resume?

22 A. Yes.

23 Q. What is the purpose of your testimony today?

24 A. Hearing Officer Holt and members of the Board,  
25 I am here to request approval of the New Mexico

1 Environment Department's proposed revisions to the State  
2 Implementation Plan, or SIP, regarding 20.2.7 NMAC,  
3 Excess Emissions.

4 A copy of the rule with the proposed revisions  
5 is attached to the notice of intent as NMED Exhibit 5.

6 Q. Did you prepare and prefile written technical  
7 testimony providing the background and rationale for  
8 these proposed SIP revisions?

9 A. Yes, in NMED Exhibit 6.

10 Q. Do you have any changes or corrections to that  
11 written testimony that you would like to make?

12 A. Yes. In NMED Exhibit 6 on page 10, line 16  
13 should read "Section 6 subsection B."

14 Also on page 10, a fourth bullet should be  
15 added under line 18 to read "Section 116."

16 In the same exhibit on line 13, line -- on  
17 page 13 -- I'm sorry -- on page 13, line 8, the date  
18 should be July 10th, 2016.

19 And we received the original affidavit of  
20 publishing -- publication from the English language  
21 public notice from the Albuquerque Journal and provided  
22 copies of it to the Board's administrator for your  
23 notebooks.

24 MR. ATENCIO: Mr. Holt, members of the Board,  
25 I believe we handed those to Pam, and she can pass those



1 out at this time.

2 Q. With those changes, do you adopt your written  
3 testimony as your testimony under oath here today?

4 A. Yes.

5 Q. In general terms, please describe the purpose  
6 of the proposed SIP revisions to 20.2.7 NMAC, Excess  
7 Emissions.

8 A. The Department is here today to request the  
9 Board's approval of the proposed SIP revisions regarding  
10 20.2.7 NMAC, Excess Emissions, which I'll refer to as  
11 Part 7.

12 A markup of the nonregulatory provisions to  
13 Part 7 can be found in NMED Exhibit 5.

14 The SIP revisions entail the removal of  
15 certain SIP -- certain sections of Part 7 from the SIP,  
16 leaving those sections as state-only provisions. These  
17 revisions are in response to the final action by the EPA  
18 published in the Federal Register June 12th, 2015,  
19 presented as NMED Exhibit 14.

20 In the final action, or SIP call, EPA issued a  
21 finding that certain SIP provisions for New Mexico as  
22 they pertain to Part 7 were substantially inadequate to  
23 meet the Clean Air Act requirements. This SIP call was  
24 EPA's response to a petition filed by the Sierra Club  
25 that concerned how provisions in the EPA-approved SIP

1 for New Mexico treats excess emissions during startup,  
2 shutdown, malfunction and/or maintenance events. I will  
3 refer to these as SSMS.

4 EPA also clarified its reinterpretation of the  
5 Clean Air Act requirements with respect to treatment in  
6 SIPs of excess emissions that occur during periods of  
7 SSM events.

8 The final action became effective on May 22nd,  
9 2015. The Clean Air Act requires the state to submit a  
10 corrected SIP within 18 months of the effective date of  
11 the SIP call. The state has until November 22nd, 2016,  
12 to submit its corrected SIP revisions.

13 In May of 2013, the Department submitted  
14 comments strongly disagreeing with the EPA's proposed  
15 findings of substantial inadequacy.

16 The Department's comments can be found in NMED  
17 Exhibit 11.

18 The Department's letter reiterated during  
19 the -- reiterating that during the development of Part 7  
20 the Department worked closely with EPA Region 6 and as a  
21 result Part 7 mirrored the 1999 guidance. Along with  
22 the comment letter, the Department submitted  
23 interpretive letter to EPA Region 6 that detailed how  
24 Part 7 conformed to the 1999 policy and the Clean Air  
25 Act.

1           The interpretive letter can be found in NMED  
2 Exhibit 12.

3           In the final SIP call, the EPA granted the  
4 petitioner's objection to the three provisions of the  
5 New Mexico SIP that provide affirmative defenses for  
6 excess emissions that occur -- that occur during -- and  
7 you can find this again in NMED Exhibit 5 --  
8 malfunctions in Section 111 of Part 7, startup and  
9 shutdown in Section 112 of Part 7, and emergencies in  
10 Section 113 of Part 7.

11           In the SIP call the EPA determined that these  
12 three provisions of the SIP were inadequate to meet the  
13 Clean Air Act.

14           The EPA also addressed a 2014 court decision  
15 finding that the EPA exceeded their statutory authority  
16 with respect to monetary penalties for private civil  
17 suits by allowing affirmative defenses in an EPA rule  
18 regarding Portland cement plants.

19           The court's decision can be found in NMED  
20 Exhibit 13.

21           The EPA believed that the reasoning in the  
22 court case indicates that the states have no authority  
23 in SIP provisions to alter the jurisdiction of federal  
24 courts to assess penalties for violations of the Clean  
25 Air Act requirements through affirmative defense

1 provisions.

2 Q. Mr. Spillers, could you please provide a brief  
3 definition of affirmative defenses?

4 A. An affirmative defense allows a facility to  
5 claim a defense from civil penalties for excess  
6 emissions of air pollutants. The Air Quality Bureau  
7 reviews information provided by the facility to  
8 determine if the excess emission meets the criteria  
9 outlined in Part 7.

10 If so, the Bureau may approve affirmative  
11 defense -- affirmative defense and will not assess a  
12 penalty, though excess emissions remain a violation that  
13 must be corrected. There are no automatic affirmative  
14 defense approvals.

15 Q. In general terms, what are the proposed  
16 revisions to Part 7?

17 A. As previously mentioned, the EPA granted the  
18 Sierra Club's petition with respect to Sections 111, 112  
19 and 113 of Part 7. To be federally approvable, the rule  
20 must not preclude the federal courts from determining  
21 whether a violation has occurred or imposing penalties.

22 The SSM SIP call allows the state broad  
23 discretion concerning how the state can revise its SIP.  
24 After a review of comments received, evaluating input  
25 received at public meetings and discussion with EPA

1 Region 6, it was determined that removing Sections 111,  
2 112 and 113 from the SIP would adequately address the  
3 SIP call and continue to meet the regulatory needs of  
4 the state with respect to excess emissions.

5 Along with Sections 111, 112 and 113, the  
6 following will also be removed from the SIP as they also  
7 deal with affirmative defense.

8 And these can be found in NMED Exhibit 5,  
9 also.

10 Section 6, subsection B; Section 110,  
11 subsection B, paragraph 15; Section 115; and  
12 Section 116.

13 Removing all these sections from the SIP but  
14 retaining them as state-only provisions will allow the  
15 state to maintain the necessary enforcement authority  
16 over the permitted facilities without impeding civil or  
17 federal actions for violations associated with SSMs.  
18 There will be no changes to the enforcement of Part 7 on  
19 the state level.

20 The draft SIP revisions were sent to EPA for  
21 review and comment. On May 25th, 2016 -- which you can  
22 find in NMED Exhibit 15 -- EPA Region 6 approved the  
23 draft revisions to Part 7, stating "As proposed, we  
24 continue to believe that an approach of retaining  
25 affirmative defense-related provisions of the Excess

1 Emissions Rule as a matter of state law, outside of the  
2 SIP ('State-only'), would be consistent with Clean Air  
3 Act requirements, and consistent with the EPA's guidance  
4 in the Startup, Shutdown, and Malfunction Policy."

5 Included in the EPA's letter were two specific  
6 comments.

7 The first comment was that the Department  
8 should include in the SIP submittal letter a request for  
9 EPA's review and approval for the removal of the  
10 previously mentioned sections of Part 7 from the SIP as  
11 required by the SIP call.

12 The Department will include a statement to  
13 this effect in the SIP submittal letter to EPA Region 6.

14 A second comment was that, since the  
15 Department is proposing to remove the previously  
16 mentioned provisions from the SIP, the Department will  
17 be required by the Clean Air Act to provide a 110(1)  
18 noninterference demonstration.

19 The Department will provide a demonstration  
20 that the revised SIP does not interfere with attainment  
21 and maintenance of the standards. The demonstration  
22 will rely on the fact that we believe the revisions in  
23 this particular action would strengthen the New Mexico  
24 SIP by removing the substantially inadequate provisions  
25 from the SIP.

1 Q. What happens if the Board does not adopt the  
2 proposed revisions?

3 A. Should the Board choose not to adopt the  
4 proposed revisions and the state fails to submit its  
5 corrective SIP revisions by September -- by the  
6 November 22nd, 2016, deadline, then the EPA could issue  
7 a finding of failure and impose a Federal Implementation  
8 Plan within 24 months after the November deadline.

9 Such a federal plan would likely completely  
10 remove affirmative defense in New Mexico. In addition,  
11 if the state fails to make the required SIP revisions or  
12 EPA disapproves the state plan, then either event can  
13 trigger a mandatory 18-month or 24-month sanctions clock  
14 under the Clean Air Act Section 179.

15 Q. What public notification was given for these  
16 proposed revisions?

17 A. Prior to drafting revisions to Part 7, the  
18 Department held three public information meetings in  
19 Roswell, Farmington and Santa Fe. Once the Department  
20 drafted and distributed the draft revisions to Part 7,  
21 there were three more public comment meetings held in  
22 the same locations.

23 The Department published the proposed SIP  
24 revision hearing notice in English and in Spanish in the  
25 Albuquerque Journal on July 10th, 2016.

1 Proof of publishing is included in NMED  
2 Exhibit 16.

3 Q. In closing, do you have anything else to add?

4 A. It was never the intent of Part 7 to preclude  
5 an enforcement action by the federal government or a  
6 citizen suit pursuant to the federal Clean Air Act, as  
7 clearly stated in 20.2.7.115 NMAC, found in NMED  
8 Exhibit 5.

9 The excess emissions rule essentially affects  
10 all regulated sources in the public within the state.  
11 Removing these sections from the SIP will allow the  
12 state to maintain enforcement over permitted facilities  
13 while not impeding civil or federal actions for  
14 violations associated with SSMS. There will not be any  
15 regulatory change associated with the SIP revisions.

16 Q. Will this proposed SIP revision satisfy New  
17 Mexico State Statute 74-2-5, pertaining to the duties  
18 and powers of this Board?

19 A. Yes. In accordance with that section, the  
20 proposed SIP revision will not -- will result in no  
21 increases in emissions of air pollutants which would  
22 interfere with health, welfare, visibility or property,  
23 no increase in regulatory burden on facilities or harm  
24 to the public interest, and no increase in economic  
25 hardship. The proposal will have no effect on small



1 businesses.

2 Q. Has the Department drafted a proposed  
3 statement of reasons?

4 A. Yes. The proposed statement of reasons is  
5 marked as NMED Exhibit 17.

6 Q. Mr. Spillers, would you like to make any  
7 closing remarks?

8 A. The Department respectfully requests that the  
9 Board approve the proposed SIP revisions regarding Part  
10 7.

11 Thank you.

12 MR. ATENCIO: Mr. Hearing Officer and members  
13 of the Board, that concludes the direct questions I have  
14 for Mr. Spillers.

15 At this time I'd like to offer Mr. Spillers  
16 and the rest of the Department's witnesses to answer any  
17 questions that you may have.

18 MR. HOLT: Would you like to have the exhibits  
19 you tendered here admitted into evidence?

20 MR. ATENCIO: Yes. Thank you for the  
21 reminder.

22 Yes. I'd move NMED Exhibits 1 through 17 into  
23 the record.

24 MR. HOLT: They will be admitted.

25 (Exhibits NMED 1 through 17 admitted into

1 evidence.)

2 EXAMINATION

3 BY THE BOARD:

4 MR. HOLT: Mr. Timm, can you hear me?

5 MR. TIMM: Yes.

6 MR. HOLT: Do you have any questions of this  
7 witness, sir?

8 MR. TIMM: This is Christopher Timm.

9 Not really, though -- I guess, just one  
10 question.

11 Should the -- (inaudible).

12 THE REPORTER: Mr. Timm, you're going to have  
13 to repeat, please, and slower and louder.

14 MR. TIMM: Yes, ma'am.

15 I said should it not be approved, do the  
16 federal -- do the EPA take over all or part of the  
17 state's implementation plan? That was the question.

18 Did you get that this time?

19 THE REPORTER: Yes. Thank you.

20 MR. SPILLERS: The EPA will only take over the  
21 associated sections -- the sections associated with this  
22 SIP call, which would be anything associated with  
23 affirmative defense provisions of the SIP as found in  
24 Part 7.

25 Is that what -- the answer you're looking for?

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1 I couldn't totally understand you.

2 MR. TIMM: I'm sorry. I missed that.

3 Was that a question to me?

4 MR. SPILLERS: I was just making sure I  
5 answered your question correctly.

6 If the -- if the federal government -- if the  
7 EPA issues a Federal Implementation Plan, it will only  
8 be associated with the provisions found in the SIP call,  
9 Sections 111 and 112 and 113, that have to do with  
10 affirmative defense, not the entire State Implementation  
11 Plan.

12 MR. TIMM: Thank you very much. That answered  
13 my question.

14 MR. HOLT: Can I fairly summarize your answer  
15 by saying if we don't do it, the feds are going to do it  
16 for us?

17 MR. SPILLERS: Pretty much.

18 MR. HOLT: Mr. Morrow?

19 MR. MORROW: I guess we have no choice.

20 MR. HOLT: Do you have any questions of the  
21 witness?

22 Point taken.

23 MR. MORROW: No, I have no questions.

24 MR. HOLT: Chairman Volkerding.

25 MR. VOLKERDING: I have a couple. I have

1 maybe -- yeah. I've got a couple.

2 Exhibit 6, page 9, paragraph VII (verbatim).  
3 And this is just to kind of ferret out a little bit of  
4 detail.

5 MR. SPILLERS: Which line is that?

6 I'm sorry.

7 MR. VOLKERDING: Oh. Well, it's the whole  
8 paragraph of Regulatory Alternatives.

9 MR. SPILLERS: Yeah.

10 MR. VOLKERDING: Basically four alternatives  
11 are laid out, and then it says -- then basically what  
12 we're here to do is approve approach number two, if I --  
13 if I read that correct.

14 But there wasn't a whole lot of discussion as  
15 to why necessarily that was chosen versus the other  
16 three, and since they were laid out there, I was just  
17 kind of wanting for the record a little bit of  
18 discussion as to why the other ones weren't.

19 MS. BATES: I can answer that.

20 MR. VOLKERDING: Okay.

21 MS. BATES: Chairman Volkerding, members of  
22 the Board, Hearing Officer Holt, we evaluated all of  
23 these sections.

24 Under the first approach, we could repeal Part  
25 7 in its entirety and eliminate -- eliminate the

1 affirmative defenses. I -- that alternative did not  
2 appeal to us, for one thing because we think affirmative  
3 defenses do provide something that we can use and that  
4 sources in the state can use in order to give us a  
5 reason for what happened and let us take that into  
6 consideration.

7 The other -- the second approach is that the  
8 Department could remove those sections but retain them  
9 as state-only, and that's the approach that we took.

10 The third approach was that we would replace  
11 all references to affirmative defenses with provisions  
12 that provide an enforcement discretion approach.  
13 Several states are going that route, and they're really  
14 having a lot of back and forth with EPA and a lot of  
15 internal discussion and a lot of heartburn over how that  
16 would actually be worded and how that would work.

17 And it -- it's a very complex way to do it,  
18 and it essentially accomplishes what we're accomplishing  
19 here today in a much simpler way.

20 And the fourth approach, developing  
21 alternative emission limitations, that is something that  
22 EPA does routinely on different kinds of rules, like  
23 Maximum Achievable Control Technology rules, New Source  
24 Performance Standards and the like.

25 I think if we try to do something like that,

1 it would be kind of difficult to do to develop that for  
2 all the different kinds of sources that exist in the  
3 state, and there are already a number of those in place,  
4 and I'm not sure how we could do that without tripping  
5 up over some of the other requirements that already  
6 exist.

7 MR. VOLKERDING: Thank you. That -- perfect.  
8 Appreciate that.

9 So probably -- maybe shouldn't even ask this  
10 question. How confident is the Department that the EPA  
11 will approve the request, if -- if the Board approves  
12 the Department's petition and then the Department  
13 submits that to EPA Region 6, I mean, how confident is  
14 it that Region 6 will actually go ahead and approve this  
15 approach?

16 MR. SPILLERS: Well, we've sent it in for  
17 their review and comment, and they did approve it, and  
18 it does follow along with the start -- with the  
19 provisions outlined in the SIP call. So we believe that  
20 there shouldn't be any reason that they would not  
21 approve it.

22 MR. VOLKERDING: Okay.

23 Exhibit 16 -- and this is again just kind of  
24 for detail for the record. In that there were a couple  
25 sign-in sheets that did not have location or dates.

1 Do you happen to know off the top of your  
2 heads which -- I can guess. I just didn't want to do  
3 that.

4 So like the first one, I'm assuming that was  
5 in Santa Fe.

6 MR. SPILLERS: Oh. Yeah.

7 MR. VOLKERDING: Do you happen to know if that  
8 was 2015? 2016?

9 MR. SPILLERS: This was in 2015, approximately  
10 September, I believe.

11 MR. VOLKERDING: Okay.

12 And then a couple pages further there's one on  
13 just a piece of paper, and I am assuming that is in  
14 Farmington?

15 MR. SPILLERS: Yes.

16 MR. VOLKERDING: And then again 2015 or 2016?  
17 Do you happen to know?

18 MR. SPILLERS: Offhand I really don't know --

19 MR. VOLKERDING: Okay.

20 MR. SPILLERS: -- which -- if you give me a  
21 second, I might be able to figure it out for you.

22 2015.

23 MR. VOLKERDING: Okay.

24 And my last one is in Exhibit 17, the  
25 statement of reasons, page 5, paragraph 25. And in your

1 oral you kind of touched on some of this. I was just  
2 hoping to get a little bit more specificity.

3 It says -- you know, the line in the exhibit  
4 says the revisions satisfy the statutory requirements of  
5 the Air Quality Control Act, Section 74-2-5(E).

6 And basically that lists three things that the  
7 Board's supposed to consider when making decisions, and  
8 I was just hoping to get a little bit more clarity on  
9 the three points as to how this meets that.

10 So the first one would be character and degree  
11 of injury to health and welfare for the State of New  
12 Mexico.

13 I guess, how -- how does that meet that  
14 requirement if we were to approve this?

15 MR. SPILLERS: Basically there will be no  
16 change in the way the enforcement of Part 7 will be  
17 conducted. There's nothing really changing in it.

18 MR. VOLKERDING: Okay.

19 MR. SPILLERS: The only difference is that it  
20 will be state-enforceable-only versus federally  
21 enforceable.

22 MR. VOLKERDING: Okay.

23 And then the next one is public interest and  
24 social and economic value to the state.

25 MR. SPILLERS: My answer would have to



1 probably be the same thing, is that this rule has  
2 already been approved, and we've been using this rule  
3 for several years now. The repeal was in 2008, revise  
4 and repeal, and it continues to meet the same  
5 requirements. There will be no change.

6 MR. VOLKERDING: Last one should be easy,  
7 technical practicability of implementing this.

8 MR. SPILLERS: There will be no change in the  
9 enforcement of Part 7 whatsoever.

10 MR. VOLKERDING: All right. I just kind of  
11 wanted to just go through that since that's our --  
12 that's something that we have to address or at least say  
13 that we've considered when we make decisions.

14 So that is all I have.

15 MR. HOLT: I have a couple questions.

16 I want to follow up on something that Chairman  
17 Volkerding started on. Exhibit 6, page 9 lists the four  
18 options that we have, and I want to confirm that what is  
19 being proposed here is the second option, which reads  
20 "Under another approach, the Department could remove  
21 Sections 111, 112, and 113 in their entirety from the  
22 SIP but retain them as state-only requirements"; is that  
23 correct?

24 MR. SPILLERS: Yes.

25 MR. HOLT: How and where are we retaining

1     them?

2                 MR. SPILLERS:  It's -- basically it's still a  
3     state rule.  We're not changing any regulatory  
4     requirements in Part 7.  So it's still going to be in  
5     20.2.7 NMAC, Excess Emissions.  It's just that we're  
6     taking those particular sections -- 20.2.7 -- Part 7 is  
7     part of the SIP -- was adopted as part of the original  
8     SIP in New Mexico -- of New Mexico.

9                 And we're only taking those certain portions  
10    out that have to deal with parts -- with affirmative  
11    defense out of the SIP and retaining them as state-only  
12    rules.

13                MR. HOLT:  But when you say you retain them as  
14    state-only rules, if we approve this, we're removing  
15    111, 112 and 113, aren't we?

16                MS. BATES:  No.  Hearing Officer Holt, this is  
17    confusing.

18                They will only be not federally enforceable.  
19    They will still remain in the rule.  They are not  
20    recommended to be removed or repealed from the rule.  
21    This is not a rule repeal.  It is only a removal from  
22    the SIP.  It's a revision to the State Implementation  
23    Plan.

24                So the rule will still look the same.  We are  
25    going to add the bracketed material at the bottom of

1 each of those sections so that anyone who is reading  
2 this rule will know that that is -- those sections are  
3 not part of New Mexico's federally enforceable State  
4 Implementation Plan, but they still will remain in the  
5 rule.

6 There is no rule revision here, no repeal of  
7 those sections. It will -- those sections will only be  
8 not enforceable federally.

9 Now, we've got some other rules that have  
10 sections in them that are not federally enforceable and  
11 not part of the SIP but that are otherwise SIP rules.  
12 For example, we've got a section in 20.2.7.2 NMAC,  
13 Construction Permits, about air toxics that are not  
14 federally enforceable, they're not part of the SIP.

15 So this is not an unusual thing for us to do.  
16 It's just they will -- they will continue to exist as a  
17 state rule, we will continue to enforce as we have been  
18 enforcing, and there will be no change to the rule  
19 language; however, EPA will not consider that to be part  
20 of New Mexico's federally enforceable State  
21 Implementation Plan.

22 MR. HOLT: I'm with you.

23 MS. BATES: Okay.

24 MR. HOLT: So the Clean Air Act contains  
25 provisions in there about things the courts are to look

1 at in determining whether to issue a civil penalty which  
2 doesn't include affirmative defenses but does include  
3 other things as justice dictates.

4 What's the state authority for having a state  
5 regulation on this other than the SIP itself?

6 MS. BATES: We've got a number of state rules  
7 that are not part of the State Implementation Plan, and  
8 so I guess our authority is really under the Air Quality  
9 Control Act to have those rules and plans. They don't  
10 necessarily have to be federally required rules and  
11 plans.

12 For example, we've got some language in our  
13 state statute, the Air Quality Control Act, about ozone  
14 plans for areas that are within 95 percent of the  
15 standard. Those are not federal requirements.

16 So there are a number of things that are  
17 allowed by state statute that are not required by the  
18 Clean Air Act. And this would be kind of going along  
19 that same path of allowing, you know, state rules.

20 New Mexico is not the same as everywhere else.  
21 No state is. A lot of states have rules that are  
22 state-only rules, not federal rules, and probably --  
23 California is probably most notorious for that, because  
24 their rules are a lot more stringent than a lot of the  
25 federal rules.

1           This is not a stringency issue. I don't see  
2   that as this being that. EPA has no problem with us  
3   maintaining this as a state-only requirement. And it  
4   just allows us another opportunity for evaluating these.

5           I want to again direct your attention to  
6   Section 115 in the rule, because that does not preclude  
7   any court action. It's been in there since the  
8   beginning of this rule. This is not new language.

9           That's why we strongly -- we strongly rejected  
10   EPA's SIP call or proposal on this, because we said no,  
11   we've never ever -- we've got this already in our rule,  
12   we've never said that this could preclude a federal or  
13   civil action, and in fact, our rule specifically says  
14   that it will not.

15           So I hope that answers your question.

16           MR. HOLT: To at least some large measure,  
17   this started when the court in the NRDC case -- and  
18   perhaps I really need to address this to the lawyer  
19   so -- we speak a similar language here.

20           The question was one of Chevron deference, and  
21   the court rejected this bill within Chevron deference  
22   with regard to regulations.

23           Are we going to have the same problem in some  
24   court, challenging this regulation with regard to the  
25   state statute? Is it within our authority under state

1 law to adopt this regulation, since we're, obviously,  
2 not adopting it under the Clean Air Act?

3 MR. ATENCIO: Mr. Hearing Officer, members of  
4 the Board, there should be no issue with that. The --  
5 while the decision did include discussion on Chevron  
6 deference, much of it was in relation to what the court  
7 perceived as encroachment by the EPA on the court's  
8 jurisdiction in particular to no civil -- excuse me --  
9 third-party civil suits and the court's authority to  
10 decide penalties in that case.

11 There -- there should not be an issue under  
12 state statute. And any of those -- any of those actions  
13 under the Clean Air Act should also be brought, I  
14 believe, in federal court, not -- not state court, if  
15 somebody chose to bring a suit under those Clean Air Act  
16 provisions.

17 This -- and I would maybe point your attention  
18 to paragraph 24 of Exhibit 17, proposed statement of  
19 reasons. In discussions with the EPA Region 6 in  
20 whether this would be an approvable approach, this  
21 particular language was requested by Region 6 counsel as  
22 clarifying and making it explicit and drawing the lines  
23 of jurisdiction in this matter, in particular to address  
24 the NRDC decision.

25 MR. HOLT: You are convinced that Section 7

1 can stand as a regulation of this body as opposed to  
2 merely a SIP of this -- adopted pursuant to the Clean  
3 Air Act?

4 MR. ATENCIO: Yes, Mr. Hearing Officer,  
5 members of the Board. In effect, this -- in keeping it  
6 as a regulation and not part of the SIP, what the Board  
7 would be doing is having a regulation applicable to the  
8 New Mexico Environment Department Air Quality Bureau,  
9 and that is the extent of how far we go. And yes, we  
10 believe it would stand.

11 MS. BATES: I would like to clarify that we're  
12 not removing all of Part 7 from the SIP, only those  
13 sections that we've mentioned.

14 MR. HOLT: I understand. Thank you.

15 All right. I have no other questions.

16 Anyone on the Board have other questions?

17 Does anyone in the public have any questions?

18 Mr. Atencio, is there anything further from  
19 the Department?

20 MR. ATENCIO: If I might just make a brief  
21 closing statement.

22 MR. HOLT: Please.

23 MR. ATENCIO: Mr. Hearing Officer, members of  
24 the Board, thank you for your time today and to listen  
25 to the testimony the Department has provided.

1           The Department believes that the proposal to  
2 keep these affirmative defense provisions as a  
3 state-only rule is in the best interest of the state and  
4 the program. This proposal as discussed is one of the  
5 allowable options the EPA listed in its SIP call, and  
6 this proposal has a preliminary support of EPA Region 6.

7           The Department respectfully requests the Board  
8 approve this proposal and direct the Department to  
9 submit it for approval to EPA.

10           Thank you.

11           MR. HOLT: Thank you.

12           Anything further to include in the record,  
13 Mr. Chairman?

14           MR. VOLKERDING: No, other than if there's any  
15 other public comment.

16           MR. HOLT: Any other public comment on this  
17 matter?

18           Yes, sir. If you could come forward, identify  
19 yourself and speak your mind.

20                           MIKE BOWEN

21           having been first duly sworn or affirmed, was  
22 examined and testified as follows:

23                           DIRECT TESTIMONY

24           THE REPORTER: Would you state and spell your  
25 name for me.



1 MR. BOWEN: My name is Mike Bowen, B-O-W-E-N.

2 I am the executive director of the New Mexico  
3 Mining Association.

4 And I just wanted to let the Board know,  
5 Mr. Chairman, that the Mining Association supports  
6 NMED's proposed changes to this SIP -- or State  
7 Implementation Plan.

8 We feel that -- we had the rule -- or the  
9 proposed changes reviewed by our environment committee  
10 chairman and our environment committee, and we feel the  
11 changes preserve the affirmative defenses that have been  
12 in place for many years for purposes of state law.  
13 We -- the affirmative defenses are very important to our  
14 members of the mining industry who strive to comply with  
15 air quality laws, regulations and permits.

16 The changes -- we feel the changes adopt an  
17 approach that is acceptable to EPA, and this will avoid  
18 potential action by EPA that could have unpredictable  
19 consequences for our industry.

20 So for those reasons we support the proposed  
21 changes.

22 MR. HOLT: Thank you.

23 Does any member of the Board have questions?

24 Anyone from the public have questions for  
25 Mr. Bowen?

1 Thank you very much.

2 MR. BOWEN: Thank you.

3 MR. HOLT: Appreciate it.

4 Is there anything further from anyone?

5 This hearing is closed.

6 Mr. Chair, I return it to you.

7 MR. VOLKERDING: Thank you.

8 Do we want to deliberate?

9 Mr. Timm, we'll start with you. As you're  
10 coming closer to us, it may be getting weird.

11 Making weird noises. Sorry. I didn't finish  
12 that sentence, did I?

13 So, Mr. Timm, do you have any -- any comment  
14 you'd like to make?

15 Are you still there?

16 MR. TIMM: I'm sorry. Repeat the question. I  
17 was on mute.

18 MR. VOLKERDING: Oh. I was just wondering if  
19 you had any comments that you'd like to make in terms of  
20 deliberating on this.

21 MR. TIMM: The only comment is I think -- I  
22 appreciate that we had a very thorough briefing about  
23 this. I appreciate the support being offered by the --  
24 you know, by the member at the public hearing that we  
25 should pursue.

1 Thank you.

2 MR. VOLKERDING: Okay.

3 Any other comments, any other --

4 MR. MORROW: I appreciate the statement from  
5 Mr. Bowen and the other letters that were sent in from  
6 the -- that we got from the public. If they have no  
7 problem, I have no problem.

8 MR. VOLKERDING: Mr. Holt?

9 MR. HOLT: Yeah. I support the ED's proposal  
10 here, have no problem removing from the SIP the  
11 italicized language and adding in the annotations to  
12 make clear the italicized language has been removed from  
13 the SIP, it remains part of the state regulation.

14 MR. VOLKERDING: Okay.

15 And I -- I support the Department's proposal.  
16 I -- I agree with the Department's exhibits that I -- I  
17 somewhat -- and that was kind of the purpose of my  
18 question about whether Region 6 will approve this, is  
19 just that I somewhat feel that this was not necessarily  
20 necessary, that the regulation as written was fairly  
21 clear, it did not preempt federal or private parties.

22 But I -- I do think that it -- it should  
23 address the EPA's concerns, and I think the Department  
24 has done an outstanding job in laying out the case  
25 for -- for their request.

1 So is there a -- is there a motion?

2 MR. HOLT: I will move to approve the request  
3 of the ED to remove the italicized language reflected in  
4 Exhibit -- New Mexico Environmental Department's  
5 Exhibit 5 from the SIP, to retain it as part of the  
6 regulation and to add the underlying language as  
7 annotations to make clear the intent to remove it from  
8 the SIP, to leave it in the regulations.

9 MR. MORROW: Okay. I'll second that.

10 MR. VOLKERDING: All right. It is moved and  
11 second.

12 Any other -- any other Board comment?

13 If not, all in favor.

14 MR. HOLT: Aye..

15 MR. MORROW: Aye.

16 MR. VOLKERDING: Aye.

17 MR. TIMM: This is Christopher Timm.

18 Aye.

19 MR. VOLKERDING: Okay. Unanimously approved.

20 So the petition is approved. Thank you.

21 On Exhibit 17, I -- although it was entered  
22 into the record, the Board may want to consider its own  
23 order for statement of reasons and just flush out a few  
24 additional details, primarily focusing -- at least my  
25 issues primarily focusing on the Air Quality Control Act

1 and the three paragraphs that I discussed during oral.

2 And then, Member Holt, did you have anything  
3 else that you had a question on?

4 MR. HOLT: Yeah. There's a few minor matters  
5 in the statement of reasons that I would like to suggest  
6 some changes to. I don't know that we need to debate  
7 them. I would be happy to take responsibility for  
8 preparing a revised version of this and circulating it.

9 MR. VOLKERDING: That would --

10 MR. HOLT: If it meets the Chairman's  
11 approval, he could sign it.

12 MR. VOLKERDING: That works for me if that  
13 works for the rest of the Board.

14 MR. HOLT: If the Environmental Department  
15 gave me an electronic copy so I don't have to retype the  
16 entire thing, that would be great.

17 MR. ATENCIO: Yes, sir.

18 MR. VOLKERDING: Okay. I have managed to  
19 misplace my agenda.

20 (Proceedings adjourned at 9:58 a.m.)

21

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24

25

1 STATE OF NEW MEXICO )  
2 ) ss.  
3 COUNTY OF BERNALILLO )  
4  
5

6 I, CHERYL ARREGUIN, the officer before whom the  
7 foregoing proceeding was taken, do hereby certify that  
8 the witnesses whose testimony appears in the foregoing  
9 transcript were duly sworn or affirmed; that I  
10 personally recorded the testimony by machine shorthand;  
11 that said transcript is a true record of the testimony  
12 given by said witnesses; that I am neither attorney nor  
13 counsel for, nor related to or employed by any of the  
14 parties to the action in which this proceeding is taken,  
15 and that I am not a relative or employee of any attorney  
16 or counsel employed by the parties hereto or financially  
17 interested in the action.

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